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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GONZALO JOE CAZARIN, JR., Defendant and Appellant.	F075853 (Super. Ct. No. 16CMS0573B) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Aaron Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Peter H. Smith, Daniel B. Bernstein and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Gonzalo Joe Cazarin, Jr., was charged with brandishing a firearm in the presence of a motor vehicle occupant (Pen. Code,[1] § 417.3 [count 1]); unlawful possession of a firearm by a convicted felon (§ 29800, subd. (a)(1) [count 2]); carrying a

[1] Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

loaded firearm in public (§ 25850, subd. (a) [count 3]); unlawful possession of ammunition (§ 30305, subd. (a)(1) [count 4]); and receiving stolen property (§ 496, subd. (a) [count 5]). As to count 1, the information alleged defendant was previously convicted of a serious felony (§ 667, subd. (a)(1)). As to all counts, the information alleged he was previously convicted of a qualifying "strike" offense (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and served a prior prison term (§ 667.5, subd. (b)).

Prior to trial, defendant admitted he was previously convicted of a serious felony, was previously convicted of a qualifying strike offense, and served a prior prison term. Later, the trial court granted the prosecution's request to dismiss count 3 and the defense's request to dismiss count 5.

Following trial, the jury found defendant guilty on counts 1, 2, and 4. Defendant initially received an aggregate sentence of 13 years 4 months: a doubled base term of six years, plus five years for the prior serious felony conviction and one year for the prior prison term, on count 1; and a consecutive 16 months on count 2. Execution of punishment on count 4 was stayed pursuant to section 654.[2] Pursuant to section 1170, subdivision (d), the trial court recalled the case for resentencing and struck the one-year prior prison term enhancement.

On appeal, defendant makes numerous contentions. First, the convictions on counts 1 and 2 must be reversed because the evidence did not sufficiently establish the object he possessed and brandished was a firearm. Second, the prior serious felony enhancement could not be imposed on count 1 because the jury never determined whether the charged offense was a serious felony. Third, the conviction on count 2 must be reversed because defendant did not stipulate he was a convicted felon. Fourth, the trial court should have instructed the jury on accomplice testimony. Fifth, the

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[2] The trial court imposed 16 months to run consecutively with count 1 and concurrently with count 2.

convictions on counts 2 and 4 must be reversed because the court erroneously instructed the jury on general intent rather than specific intent. Sixth, all convictions must be reversed because the verdicts were not unanimous. Finally, following recall and resentencing, defendant's aggregate sentence was reduced to 11 years.

We conclude: (1) substantial evidence established defendant possessed and brandished a firearm; (2) the jury necessarily determined the offense underlying count 1 constituted a serious felony; (3) defense counsel stipulated defendant was a convicted felon with respect to count 2; (4) the trial court had no obligation to instruct the jury on accomplice testimony; (5) the court's erroneous instruction on the concurrence of act and general intent was not prejudicial; (6) defendant forfeited his claim of polling error; and (7) following recall and resentencing, defendant's aggregate sentence is 12 years 4 months.

In a supplemental brief, defendant highlights recent amendments to sections 667, subdivision (a), and 1385, enacted by Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill No. 1393) (Stats. 2018, ch. 1013, §§ 1–2, eff. Jan. 1, 2019). He argues the case should be remanded to afford the trial court an opportunity to exercise its newfound sentencing discretion as to the prior serious felony enhancement. The Attorney General concedes a remand for this limited purpose is appropriate. We accept this concession.

STATEMENT OF FACTS

On the night of March 1, 2016, driver K.C. and her front seat passenger R.H. were leaving a relative's house when they noticed a black Nissan Altima tailing them with its headlights off. K.C. attempted to evade the Altima, but to no avail. Eventually, the Altima cut off K.C.'s vehicle, forcing it onto the side of the road. The Altima pulled up alongside K.C.'s vehicle and its front passenger's side window rolled down. The Altima's front seat passenger leaned back and defendant—the Altima's driver—waved and pointed an object. K.C. described the object as a "black gun" approximately 12 inches long. R.H. identified the object as a "gun or whatever."

After K.C. saw defendant waving the object, she sped away and called 911. Defendant continued to follow. At the intersection of Hanford Armona Road and 10th Avenue, Officer Allen spotted the Altima from his patrol vehicle and pursued it. He pulled over the Altima and, after other officers arrived on the scene, apprehended defendant and his passenger. Allen searched the Altima and found a "homemade, makeshift" "gun." At trial, he testified:

> "It had a wood stock that was, for lack of a term, not manufactured very well, and it had a barrel that was secured to this homemade wood stock by clasps, metal clasps that you would see on like a radiator hose that could clamp a radiator hose down."

Allen unlocked the bolt and observed a single .22-caliber round.

R.A. was defendant's front seat passenger on the night of the incident.[3] At trial, she testified defendant drove "really, really, really, fast" and "didn't listen" to her pleas to slow down. R.A. asked to be let out of the Altima, but defendant told her to "shut up." At some point, he was "hanging out the window" and "point[ing] a gun." When the police pulled the Altima over, defendant placed the gun under the front passenger's seat. He also asked R.A. to claim ownership of the gun, but she refused to do so.

DISCUSSION

I. Substantial evidence established defendant possessed and brandished a firearm

a. *Standard of review*

"To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible[,] and of solid value, from which a rational trier of fact could find that the elements of the crime were established

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[3] R.A. was charged with brandishing a firearm in the presence of a motor vehicle occupant (§ 417.3) and carrying a loaded firearm in public (§ 25850, subd. (a)) in the criminal complaint. She was not subsequently charged in the information.

beyond a reasonable doubt." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955 (*Tripp*).) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "We need not be convinced of the defendant's guilt beyond a reasonable doubt; we merely ask whether ' "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (*Tripp, supra*, at p. 955, italics omitted.)

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis what[so]ever is there sufficient substantial evidence to support it." (*People v. Redmond, supra*, 71 Cal.2d at p. 755.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' " (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

"This standard of review . . . applies to circumstantial evidence. [Citation.] If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*Tripp, supra*, 151 Cal.App.4th at p. 955.)

b. *Analysis*

"Every person who, . . . in the presence of any other person who is an occupant of a motor vehicle proceeding on a public street or highway, draws or exhibits any firearm, whether loaded or unloaded, in a threatening manner against another person in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a felony . . . ." (§ 417.3.) "Any person who has been convicted of . . . a felony under the laws of . . . the State of California . . . and who owns, purchases, receives, or has in

possession or under custody or control any firearm is guilty of a felony." (§ 29800, subd. (a)(1).)

A firearm is "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion." (§ 16520, subd. (a); accord, CALCRIM No. 980.)[4] "The fact that an object used by a [criminal perpetrator] was a 'firearm' can be established by direct or circumstantial evidence." (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435.) "Most often, circumstantial evidence alone is used to prove the object was a firearm. This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation." (*Id.* at p. 1436.) Therefore, "[c]ircumstantial evidence alone is sufficient to support a finding that an object used by a [criminal perpetrator] was a firearm." (*Ibid.*)

Defendant contends his convictions on counts 1 and 2 must be reversed because the evidence did not sufficiently establish the object he possessed and brandished was a firearm. We disagree. The record—viewed in the light most favorable to the prosecution—shows defendant chased and forced K.C.'s vehicle off the road and then waved and pointed an object. K.C., R.H., and defendant's passenger R.A. identified the object as a gun. K.C. specified the gun was black and approximately 12 inches long. Moreover, defendant "in effect communicated [the object] was a firearm when [he] menacingly displayed it . . . ." (*People v. Monjaras, supra*, 164 Cal.App.4th at p. 1437.) After defendant was arrested, Officer Allen searched the Altima and found a loaded "homemade, makeshift" "gun" composed of a wood stock, bolt, and barrel. (See *ibid.* ["As the old saying goes, 'if it looks like a duck, and quacks like a duck, it's a duck.' "].)

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4 With respect to unlawful firearm possession by a convicted felon (§ 29800), a firearm also "includes the frame or receiver of the weapon" (§ 16520, subd. (b)(15)).

"[W]hen . . . a defendant . . . display[s] an object that looks like a gun, the object's appearance and the defendant's conduct . . . in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm . . . ." (*Ibid.*) The jury was entitled to conclude defendant possessed and brandished a firearm.

II. The jury necessarily determined the offense underlying count 1 constituted a serious felony

"[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." (§ 667, former subd. (a)(1), amended by Stats. 2018, ch. 1013, § 1, eff. Jan. 1, 2019.) "As used in this subdivision, 'serious felony' means a serious felony listed in subdivision (c) of [s]ection 1192.7." (*Id.*, subd. (a)(4).) "[A] felony in which the defendant personally uses a firearm" qualifies as a serious felony. (§ 1192.7, subd. (c)(8).) " 'Use' of a firearm . . . 'connotes something more than a bare potential for use.' 'Use' generally means ' " 'to carry out a purpose or action by means of, to make instrumental to an end or process and to apply to advantage.' . . . " ' Thus, 'use' of a firearm may involve displaying the gun, brandishing the gun, or actually firing the gun." (*People v. Arzate* (2003) 114 Cal.App.4th 390, 399–400, fns. omitted.)

The parties agree brandishing a firearm in the presence of a motor vehicle occupant is not enumerated as a serious felony under section 1192.7, subdivision (c). Defendant acknowledges this crime "can arguably become serious in a situation where a defendant 'personally uses a firearm.' " He maintains the prior serious felony enhancement imposed on count 1 must be dismissed because—in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466—the jury was never actually tasked with deciding whether the offense underlying count 1 involved the personal use of a firearm and therefore constituted a serious felony. The Attorney General concedes a jury, in general, "must make a finding on personal use" "[w]here a section 667, subdivision (a),

enhancement is before a jury, and where personal use of a firearm is required to establish that a charged offense is a serious felony," but asserts defendant waived his right to such a finding.

Even assuming, arguendo, no waiver occurred, the purported *Apprendi* error was harmless beyond a reasonable doubt. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [prejudice from *Apprendi* error judged under *Chapman v. California* (1967) 386 U.S. 18]; see also *Chapman v. California*, *supra*, at p. 24 ["[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."].) Although the jury was not explicitly directed to decide whether the offense underlying count 1 involved the personal use of a firearm, the record shows it was instructed to determine whether defendant "drew or exhibited a firearm in the presence of another person who was in a motor vehicle that was being driven on a public street or a highway . . . in a threatening manner that would cause a reasonable person to fear bodily harm." (Accord, CALCRIM No. 980.) As mentioned, " 'use' of a firearm may involve displaying the gun . . . [or] brandishing the gun . . . ." (*People v. Arzate*, *supra*, 114 Cal.App.4th at p. 400.) In addition, the prosecutor did not argue defendant was merely an aider and abettor and the court did not instruct the jury on such a theory. By virtue of its guilty verdict on count 1, the jury essentially found defendant personally used a firearm and the charged offense constituted a serious felony. "[W]here the jury, in connection with other instructions, has necessarily determined adversely to the defendant an issue upon which it was not instructed, no error, or at least no prejudice, is shown." (*People v. Bautista* (2005) 125 Cal.App.4th 646, 655–656.)

III. Defense counsel stipulated defendant was a convicted felon with respect to count 2

a. *Background*

Before the start of trial, outside the presence of the jury, the following exchange transpired:

"THE COURT: . . . . [¶] . . . [¶] . . . [M]y understanding is that your client is . . . going to admit . . . the allegations with respect to the prior conviction back in 2013 of violati[ng] . . . [s]ection 422 and in that matter, they will not be mentioned before the jury; is that correct?

"[DEFENSE COUNSEL]: That's correct, your Honor.

"THE COURT: And Mr. Cazarin, is that your understanding as well?

"[DEFENDANT]: Yes, sir.

"THE COURT: In other words, it's a trial tactic that's being employed or being used by you and your attorney, correct?

"[DEFENDANT]: Yes, sir.

"THE COURT: Okay. [¶] And what that means is that with the admission of those allegations in this matter, the jury won't hear them, and if you're found not guilty of the underlying crimes then, of course, they're not considered at all for any type of purposes, specifically sentencing, correct?

"[DEFENDANT]: Yes, sir.

"THE COURT: That's your understanding?

"[DEFENDANT]: Yes, sir.

"THE COURT: Okay, if, however, if you are convicted then of course they would come into play for sentencing; do you understand that?

"[DEFENDANT]: Yes, sir.

"THE COURT: Okay. [¶] And specifically it would be that the violation would be considered, what they call a nickel prior, meaning it would add 5 years to any sentence, plus it would also be used as a strike offense, meaning it would double any original penalty, and it would also be used as an additional one year penalty, so automatically you'd be looking at 6 years plus a strike doubling on any one offense; do you understand this?

"[DEFENDANT]: Yes, sir.

"THE COURT: Okay. [¶] Sir, before you admit it, you do have certain rights in the matter concerning that strike offense or that prior conviction, specifically you have a right to have a jury trial in that matter or

a court trial, and at a trial the prosecution would have to prove beyond a reasonable doubt that you suffered that prior strike offense or that prior conviction of violating . . . [s]ection 422. [¶] At the trial you would have a right to confront and cross-examine any witnesses; that is to see them, hear them, ask them questions or have your attorney do that. [¶] You would also have a right to present evidence in your own defense. That would include having the Court issue subpoenas on your behalf to compel the attendance of witnesses and production of evidence all at no cost to you. [¶] You would also have a right to testify in your own defense, but nobody can force you to testify. You have a right to remain silent. Do you understand those rights?

"[DEFENDANT]: Yes, sir.

"THE COURT: At this point in time, concerning those rights with respect to the prior conviction, do you give up those rights?

"[DEFENDANT]: Yes, sir.

"THE COURT: Okay."

Defendant admitted he was convicted of making criminal threats (§ 422) in 2013, which constituted a qualifying "strike" offense (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and a serious felony (§ 667, subd. (a)(1)). The court accepted the admissions, finding defendant knowingly, intelligently, and voluntarily waived his rights. The following exchange then transpired:

"THE COURT: . . . . [¶] . . . [I]t is alleged that in [c]ount 4 . . . defendant is one of those parties that is ordered not to own, possess, or have control of a firearm, and the basis of that is, again, this [section] 422 conviction. [¶] Is there going to be a stipulation that that element of the crime has been met and therefore in choosing the jury instructions it would only indicate that he's a person . . . that—

"[DEFENSE COUNSEL]: Prohibited person.

"THE COURT: Prohibited person.

"[DEFENSE COUNSEL]: Yes, he would be admitting to that as well.

"THE COURT: Okay. [¶] . . . [A]re you accepting that admission?

"[PROSECUTOR]: Yes, your Honor.

"THE COURT: Okay. [¶] And Mr. Cazarin, again, what that means is that, for example, [c]ount 4 charges you with committing a felony violation of [section] 3[0]305[, subdivision](a)(1)[,] . . . unlawfully owning[,] possessing, or having custody and control of any ammunition, and the other element of that is that you're a person that's prohibited from possessing a firearm or ammunition, and as a result of your conviction in … [s]ection 422 on July 26, 2013, . . . again, do you admit that element without it going to the jury?

"[DEFENDANT]: Yes, your Honor.

"THE COURT: In other words, the D.A. doesn't have to prove that conviction. You just admit it. That way the jury doesn't actually hear about it, and you admit that?

"[DEFENDANT]: Yes, sir.

"THE COURT: And you concur . . . ?

"[DEFENSE COUNSEL]: Yes, I do.

"THE COURT: The Court will accept that admission as well, and that is required for [c]ount 4 and I don't believe it's required for any other count, is it?

"(No response.)

"THE COURT: Hearing nothing further then, the Court will find that we've accepted it."

Shortly thereafter, the court stated:

"THE COURT: . . . . [¶] I should indicate that with respect to [c]ount 2, that also had the allegation of the [section] 422 [conviction], and I don't intend to read that to the jury assuming that the admission on [c]ount 4 is still possible with respect to the admission.

"[DEFENSE COUNSEL]: Yes.

"THE COURT: For the element on [c]ount 2.

"[DEFENSE COUNSEL]: That's correct, your Honor."

Prior to summations, the court read to the jury the following stipulation, which had been accepted by the parties:

> " 'The parties have stipulated (agreed) that with respect to [c]ount[s] 2 and 4, the elements that defendant has been convicted of a felony within the past 10 years is true and therefore no further proof need be presented. You must accept this stipulation as true because there is no dispute.' "

b. *Analysis*

Defendant does not dispute the validity of his admissions regarding his prior strike and serious felony conviction nor his status as a prohibited person in connection with count 4. Instead, he argues he "never stipulate[d] to his status as a felon for count 2."

"When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court." (Cal. Const., art. I, § 28, subd. (f), par. (4).) "[W]hen a defendant's prior felony conviction is an element of a charged crime: (1) The prosecution can prove the conviction in open court, and that proof can include both the fact that the defendant has previously been convicted of a felony offense as well as the nature of the felony involved; or (2) the defendant can stipulate to having a felony conviction and thereby keep from the jury the nature of the particular felony." (*People v. Sapp* (2003) 31 Cal.4th 240, 261.) "Evidentiary stipulations have long been recognized as tactical trial decisions which counsel has discretion to make without the express authority of the client." (*People v. Adams* (1993) 6 Cal.4th 570, 578.)

The record unequivocally demonstrates, with respect to count 2, defense counsel stipulated defendant was a convicted felon. Since substantial evidence also established defendant possessed a firearm on the night of the incident (see pt. I.b., *ante*), the conviction on count 2 was proper.[5]

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[5] Accordingly, we reject defendant's contention the court "misinstructed that [defendant] had stipulated to being a felon." (Boldface & capitalization omitted.)

IV. The trial court had no obligation to instruct the jury on accomplice testimony

Next, defendant contends R.A. was defendant's accomplice and the trial court should have instructed the jury on accomplice testimony.

"An accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant on trial . . . ." (§ 1111; see *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 302 ["An accomplice must have ' "guilty knowledge and intent with regard to the commission of the crime." ' "].) "A conviction [cannot] be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (§ 1111.) " ' "[W]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice," ' the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice." (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

At trial, R.A. testified defendant initiated the high-speed pursuit of K.C.'s car. She implored him to slow down without success. R.A. also communicated she did not want to participate in the chase and wanted to get out of the Altima, but defendant told her to "shut up." Later, after the police pulled over the Altima, defendant hid the gun under R.A.'s seat and asked her to claim ownership of it. R.A., however, refused to cooperate. Furthermore, the record shows only defendant possessed and brandished the loaded weapon. Based on the evidence presented, the jury could not conclude R.A. was liable for the identical offenses charged against defendant. Hence, an instruction on accomplice testimony was unnecessary.[6]

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[6] In addition, K.C.'s and R.H.'s testimonies constituted ample corroborating evidence that made the purported instructional error harmless. (See *People v. Zapien*, *supra*, 4 Cal.4th at p. 982.)

V. The trial court's erroneous instruction on the concurrence of act and general intent vis-à-vis counts 2 and 4 was not prejudicial

a. *Background*

Prior to summations, the trial court read CALCRIM No. 250 (Union of Act and Intent: General Intent) to the jury:

> "The crime charged in this case requires proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crime of brandishing a firearm, . . . [s]ection 417.3 as charged in [c]ount 1; possession of a firearm by a prohibited person, . . . [s]ection 29800[,] [s]ub[division] (a)[(1)] as charged in [c]ount 2; and possession of ammunition by [a] prohibited person, . . . [s]ection 30305[,] [s]ub[division] (a)[(1)] as charged in [c]ount 4, that person must not only commit the prohibited act, but must do so with wrongful intent.
>
> "A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it's not required that he or she intend to break the law. The act required is explained in the instruction for that crime."

Later, the court read CALCRIM Nos. 2511 (Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction) and 2591 (Possession of Ammunition by Person Prohibited From Possessing Firearm Due to Conviction or Mental Illness):

> "[D]efendant is charged in [c]ount 2 with unlawfully possessing a firearm. To prove that . . . defendant is guilty of this crime, the People must prove that, one, . . . defendant possessed a firearm. [¶] Two, . . . defendant knew that he possessed a firearm. [¶] Three, . . . defendant had previously been convicted of a felony. [¶] And four, the previous conviction was within 10 years of the date . . . defendant possessed the firearm. [¶] . . . [¶]
>
> "[D]efendant is charged in [c]ount 4 with unlawfully possessing ammunition. To prove that . . . defendant is guilty of this crime, the People must prove that, one, . . . defendant possessed ammunition. [¶] Two, . . . defendant knew he possessed the ammunition. [¶] Three, . . . defendant had previously been convicted of a felony. [¶] And four, the previous conviction was within 10 years of the date that . . . defendant possessed the ammunition."

b. *Analysis*

The crime of unlawful firearm possession by a convicted felon requires "ownership or knowing possession, custody, or control of a firearm." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052.) The crime of unlawful possession of ammunition by a convicted felon similarly requires ownership or knowing possession, custody, or control of the ammunition. (See CALCRIM No. 2591.)

The parties agree the court erroneously instructed the jury on the concurrence of act and general intent vis-à-vis counts 2 and 4. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 220 ["Even in the absence of a request, a trial court must deliver an instruction (on the concurrence of act and specific intent) as to a given crime if it is one of 'specific intent.' "]; Bench Notes to CALCRIM No. 250 ["[T]his instruction **must not** be used if the crime requires a specific mental state, such as knowledge or malice, even if the crime is classified as a general intent offense. In such cases, the court must give CALCRIM No. 251, *Union of Act and Intent: Specific Intent or Mental State*."].) Nevertheless, by constitutional mandate, "[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, … unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Jones* (2012) 54 Cal.4th 1, 53 [instructional error evaluated under *Watson*'s reasonable probability standard].)

We conclude it is not reasonably probable defendant would have received a more favorable result. "While it would have been better for the trial court to have omitted the instruction as to general intent, the complete instructions specifying and emphasizing the

necessity of proof of specific intent were so clear and emphatic that the jury could not have been confused or misled as to the applicable law." (*People v. Hewitt* (1961) 198 Cal.App.2d 247, 252.) Here, the court read CALCRIM Nos. 2511 and 2591 which, in tandem, mandated defendant's knowing possession of the firearm and ammunition. "This conclusion that there was no reversible error is reinforced by the clear proof of guilt shown by the record" (*People v. Hewitt*, *supra*, at p. 252), which shows defendant: (1) chased and forced K.C.'s vehicle off the road; (2) waved and pointed the loaded firearm at K.C. and R.H.; (3) hid the firearm under R.A.'s seat when the police pulled over his Altima; and (4) asked R.A. to claim ownership of the firearm (see pts. I.b., VI, *ante*). (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [" 'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' "].)

VI. Defendant forfeited his claim of polling error

a. *Background*

After guilty verdicts were rendered on counts 1, 2, and 4, the clerk polled the jury. The reporter's transcript shows 11 of the 12 jurors orally affirmed the verdicts. The transcript did not document a verbal response from the remaining juror. The verdicts were recorded. There were no objections.

b. *Analysis*

"When the jury appear they must be asked by the court, or clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same." (§ 1149.) "When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation." (§ 1163.)

"[T]he failure to object to an incomplete polling of the jury forfeits any claim of error on appeal." (*People v. Anzalone* (2013) 56 Cal.4th 545, 550.) " '[T]he basis for the

requirement of an objection to asserted imperfections in the polling of a jury concerning its verdict is no different from the basis for requiring objections to other equally important procedural matters at trial . . . . The requirement of an objection is premised upon the idea that a party should not sit on his or her hands, but instead must speak up and provide the court with an opportunity to address the alleged error at a time when it might be fixed.' " (*Ibid.*) "[R]ather than an appellate court reviewing a cold record, the parties are present in the courtroom to observe the exchange between the court and the jurors, hear the court's comments, understand what is transpiring, and seek any necessary clarification. That they make no objection suggests they see no reason to question whether the verdict as read accurately represents the verdict reached by the jury. The parties are in the best position to know if there is reason to suspect any juror might not be fully committed to the verdict." (*Id.* at pp. 550–551.)

Absent the requisite objection, defendant forfeited his claim of polling error.

VII. Defendant's aggregate sentence following recall and resentencing is 12 years 4 months

a. *Background*

On May 23, 2017, the trial court originally imposed an aggregate sentence of 13 years 4 months: 12 years total on count 1 and a consecutive 16 months on count 2. (See *ante*.) The court also originally imposed—and stayed—a 16-month term on count 4 to run consecutively with count 1 and concurrently with count 2. (See fn. 2, *ante*.) Two days later, the case was recalled for resentencing. The court pronounced:

> "At this point in time, with respect to [c]ount 1, the charge of [section] 417.3[], the brandishing, the Court is still imposing the aggravated 3-year term doubled by the same course of conduct, the strike, 6 years plus the 5 years pursuant to [section] 667[, subdivision](a)(1).
>
> "The Court elects to strike [section] 667.5[, subdivision](b), the 1-year enhancement in this matter so that that [*sic*] is an 11-year term. Originally, I imposed the 12-year term. The line of cases also goes on to indicate that the Court could still, if there are other counts which there were

other counts in this matter, impose the [section] 667.5[, subdivision](b) enhancement on those counts.

"I am choosing to, instead of previously staying the 1-year enhancements as I did on [May 23, 2017,] for [c]ount 2 and [c]ount 4, I am striking it under [section] 1385 sub[division] (c). My reasons for striking it are that same case was used as a doubling enhancement for the strike and he has suffered that enhancement.

"Second, that same case is being used for the 5-year [section] 667[, subdivision](a) enhancement, so while the purposes of the enhancements are . . . different and they can be imposed, the Court elects not to use it for the third [section] 667.5[, subdivision](b) reasoning, which is a recidivism statute.

"[T]he Court also believes based upon the evidence that I heard at trial, the addition of a 1-year term . . . is not necessary for the punishment that I have already imposed.

"Hence, again, I'm striking the [section]667.5[, subdivision](b) enhancement as to all three counts under [section]1385[, subdivision](c) for the reasons I've put forth on the record."

The minute order and abstract of judgment reflected a modified aggregate sentence of 12 years 4 months: a doubled base term of six years, plus five years for the prior serious felony conviction, on count 1; and a consecutive 16 months on count 2.

b. *Analysis*

"When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." (§ 669, subd. (a).) "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." (*Id.*, subd. (b).) Here, the record indisputably shows, at the May 23, 2017 sentencing hearing,

the court determined the terms on counts 2 and 4 were to run consecutively with count 1. It recalled the case for resentencing and struck the one-year prior prison term enhancement on counts 1, 2, and 4. The court did not detail any other changes to the original sentence. Minus the one-year prior prison term enhancement, defendant's modified aggregate sentence following recall and resentencing is 12 years 4 months.[7]

On appeal, defendant contends the terms on counts 2 and 4 run concurrently with count 1 because the court recalled and "fail[ed] to announce whether [the] sentences . . . are to run concurrently or consecutively to each other." Section 1170, subdivision (d)(1) allows the court "within 120 days of the day of commitment" to "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." "[T]he 'as if' language indicates that the resentencing authority conferred by section 1170[, subdivision](d) is as broad as that possessed by the court when the original sentence was pronounced." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456; accord, *People v. Johnson* (2004) 32 Cal.4th 260, 266.) Nothing in this provision suggests a recall automatically vacates any or all aspects of the original sentence.[8]

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[7] Accordingly, we reject defendant's contention the abstract of judgment must be corrected to reflect an aggregate sentence of 11 years.

[8] Defendant cites *In re Candelario* (1970) 3 Cal.3d 702 and *People v. Henry* (1948) 86 Cal.App.2d 785. In the former case, the defendant pled not guilty to the charged crime but admitted he was previously convicted of a felony. He was subsequently convicted of the charged crime. However, neither the abstract of judgment nor the minutes showed a finding on the prior conviction. Thereafter, the trial court filed an amended abstract of judgment to add the prior conviction. (*In re Candelario*, *supra*, 3 Cal.3d at p. 704.) In a habeas corpus proceeding, the Supreme Court concluded the court's action was improper and the prior conviction could not be used to enhance the defendant's sentence. (*Id.* at pp. 705–708.) In the latter case, the defendant was convicted on two counts. However, the judgment imposed a single sentence and "nothing [wa]s said concerning an imprisonment with respect to each count." (*People v. Henry*, *supra*, 86 Cal.App.2d at pp. 786, 790.) The Fourth Appellate District held, "[u]nder such circumstances, it will be presumed that only one sentence was intended and that the confinement for the two counts was to run concurrently." (*Id.* at p. 790.)

VIII. The case will be remanded to afford the trial court an opportunity to exercise its sentencing discretion as to the prior serious felony enhancement

At the time defendant was charged, convicted, and sentenced, section 667, former subdivision (a)(1), provided:

> "In compliance with subdivision (b) of [s]ection 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately."

Section 1385, subdivision (a) and former subdivision (b) then provided:

> "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. . . .
>
> "(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667."

After defendant was sentenced, but while his case was still pending on appeal, the Legislature enacted Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 1). As of January 1, 2019, section 667, subdivision (a)(1), provides:

> "Any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately."

Former subdivision (b) of section 1385 was deleted (Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019).

In contrast to *Candelario* and *Henry*, the court in the instant case expressly determined the terms on counts 2 and 4 were to run consecutively with count 1. Moreover, neither *Candelario* nor *Henry* involved a recall for resentencing.

In a supplemental brief, defendant asserts Senate Bill No. 1393 applies retroactively to his case and a remand for reconsideration of sentencing is proper. The Attorney General agrees. We accept this concession.

DISPOSITION

On remand, the trial court shall exercise its sentencing discretion under Penal Code section 1385, as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019), and, if appropriate following exercise of that discretion, resentence defendant accordingly. In all other respects, the judgment is affirmed.

_____
HILL, P.J.

WE CONCUR:

_____
PEÑA, J.

_____
MEEHAN, J.